Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Maritime Broadcasting System Limited,

applicant,

and

Canadian Media Guild,

respondent.

Board File: 29385-C
Neutral Citation: 2012 CIRB **663**
November 7, 2012

A panel of the Canada Industrial Relations Board (the Board or the CIRB) composed of Ms. Louise Fecteau, Ms. Judith MacPherson, Q.C., and Mr. William G. McMurray, Vice-Chairpersons, considered the above-noted application.

Counsel of Record

Mr. Bradley D.J. Proctor, for Maritime Broadcasting System Limited; and
Mr. Sean Fitzpatrick, for the Canadian Media Guild.

These reasons for decision were written by Ms. Judith MacPherson, Q.C., Vice-Chairperson.

I–Nature of the Application

[1] On April 24, 2012, the Board received an application for reconsideration pursuant to section 18 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) from Maritime Broadcasting

System Limited (MBS or the applicant) regarding the Board's decision in *Maritime Broadcasting System Limited*, 2012 CIRB LD 2767 (*MBS 2767*). MBS submits that, in *MBS 2767*, the Board erred in finding that the Manager - Maritime News Network (MMNN) position was not subject to the managerial exclusion under the *Code* and consequently, including the position within the bargaining unit it certified.

[2] In *MBS 2767*, the Canadian Media Guild (the Guild or the union) requested, pursuant to section 24 of the *Code*, that it be certified as the bargaining agent for a bargaining unit at MBS consisting of: "all employees of Maritime Broadcasting System Limited employed in its Maritime News Network operation in the city of Halifax, Nova Scotia." MBS contested the inclusion of a number of positions in the unit. Specifically, MBS argued that the position of the MMNN should be excluded from the bargaining unit because the position exercised management functions pursuant to section 3 of the *Code*.

[3] After considering the parties' submissions, the Board certified the Guild as the bargaining agent for a bargaining unit at MBS, which it described as: "all employees of Maritime Broadcasting System Limited employed in the operation of its Maritime News Network in Halifax, Nova Scotia, excluding freelancers, unpaid interns and summer students." *MBS 2767* detailed the reasons for the decision. Among other reasons, the Board was not convinced that the MMNN exercised the independent decision-making authority required to be excluded from the bargaining unit for exercising management functions pursuant to section 3 of the *Code*.

II–Issue

[4] In the instant application, MBS submits that the Board should reconsider *MBS 2767* on the grounds that errors of law and policy were committed and principles of natural justice were breached, under section 44(*b*) and 44(*c*) of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*). Specifically, MBS alleges that *MBS 2767*:

i. Failed to follow established policy with respect to managerial exclusions;

ii. Failed to follow the procedure outlined in the Board's February 22, 2012 correspondence which was based on the *Regulations*;

iii. Erred in the exercise of discretion whether to grant an oral hearing; and

iv. Erred in considering documentation and submissions outside stated time limitations.

III–Analysis and Decision

[5] Section 16.1 of the *Code* clearly provides that the Board may decide any matter without holding an oral hearing. Because of this, there is no absolute right to an oral hearing. In the present matter, the Board is satisfied that the documentation before it is sufficient for it to determine the matter without an oral hearing.

[6] After carefully considering the material on file, the reconsideration panel has not been persuaded that there was any error committed in *MBS 2767* with regard to the inclusion of the MMNN in the bargaining unit, for the following reasons, which address the grounds in sequential order.

I. Did the Board fail to follow established policy with respect to managerial exclusions?

[7] In the present case, MBS alleges that, in *MBS 2767*, the Board failed to apply its legal test for managerial exclusions and thereby committed an error of law or policy. MBS claims that the MMNN position is equivalent to that of News Director in the radio broadcasting industry and that the Board excludes such positions from bargaining units. Further, MBS submits that the Board incorrectly applied *Algoma Central Marine, a division of Algoma Central Corporation*, 2010 CIRB 531, application for judicial review dismissed by the Federal Court of Appeal in *Algoma Central Marine v. Captains and Chiefs Association*, 2011 FCA 94 (*Algoma*), to this case because *Algoma* is an authority from outside the radio broadcasting industry and considers a different situation in which supervisory employees are not within the same bargaining unit as the employees they supervise.

[8] The Guild submits that the Board determines whether a position exercises actual managerial authority and that it is merely guided by its decisions in other cases in the same industry. The Guild says that the Board is not bound by factual findings from other cases and determines whether a position exercises managerial authority on a case-by-case basis. It asserts that the Board properly did so in *MBS 2767*.

[9] The Board's jurisprudence confirms that it is not bound by its factual findings from other cases and does not determine whether a position is subject to a managerial exclusion based solely on the job title. While there may be patterns of certain positions being excluded in certain industries, the Board maintains its discretion to examine the actual duties and functions of the position on a case-by-case basis to determine whether the incumbent actually exercises managerial authority. While the Board may consider relevant case-law in a particular industry, it is not bound by it and does not exclude a position solely on the basis of a specific title and/or industry.

[10] In *MBS 2767*, the Board considered the parties' submissions and evidence regarding the MMNN's functions and duties and reached a rational decision. The Board followed its policy of narrowly interpreting the managerial exclusion under the *Code* and cited the *Algoma* decision in support of this policy. It went on to find that the MMNN position did not have the necessary degree of independent decision-making authority to be a manager within the meaning of section 3 of the *Code*. The Board concluded that the MMNN was a first-line supervisor and not a manager within the meaning of the *Code*:

> While the Manager - Maritime News Network clearly has important responsibilities with respect to the quality of the product produced by the news room, and undoubtedly exercises a number of supervisory functions in this regard, the Board cannot find that this position has the necessary degree of independent decision-making authority to warrant a finding that the incumbent performs managerial functions within the meaning of the *Code*. On the basis of the evidence supplied by the employer, the Board is of the opinion that the position is that of a first-line supervisor, not a manager within the meaning of the *Code*. The incumbent is thus an employee entitled to exercise the right to collective bargaining protected by the *Code*.
>
> (page 6)

[11] After determining that the position of MMNN was supervisory rather than managerial, the Board analyzed whether it would be appropriate to include the position in the bargaining unit with the employees that it supervises.

[12] In certification applications, the Board has the authority under section 27 of the *Code* to determine what is an appropriate bargaining unit for collective bargaining, including whether to include employees exercising supervisory functions within a bargaining unit:

> 27.(1) Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining.
>
> (2) In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union.
>
> ...
>
> (5) Where a trade union applies for certification as the bargaining agent for a unit comprised of or including employees whose duties include the supervision of other employees, the Board may, subject to subsection (2), determine that the unit proposed in the application is appropriate for collective bargaining.

[13] Based on the evidence before it, the Board concluded that, given the small number of employees in the proposed bargaining unit, there was no other obvious unit in which the MMNN could belong, nor would it be appropriate to create a separate bargaining unit for a single, supervisory employee. The Board found that the MMNN position was not in a conflict of interest with the employees whom it supervised and that it had a community of interest with the news reporters in the proposed unit. The Board, therefore concluded that it was appropriate to include the MMNN position in the bargaining unit.

[14] In *MBS 2767*, the current panel is of the view that the Board correctly applied its longstanding policy of narrowly interpreting the managerial exclusion contained in the *Code*. Further, the current panel sees no error in its conclusion that the MMNN position was not managerial but was a first-line supervisor position, nor in its reasons for including the MMNN position in the bargaining unit. This panel does not find anything in the Board's analysis that would cast serious doubt on the Board's interpretation of its discretion to determine the bargaining unit under section 27 of the *Code*.

ii. Did the Board fail to follow the procedure outlined in its February 22, 2012 correspondence which was based on the *Regulations*?

[15] MBS submits that it was not provided with a procedural mechanism to file a "surrebuttal" to the union's reply in *MBS 2767*. Further, MBS submits that the Board breached the principles of natural justice by failing to follow the procedure set out in its February 22, 2012 correspondence and its *Regulations*, and by drawing adverse inferences against MBS. The Guild takes the position that MBS was afforded the opportunity to respond to its reply submissions and that MBS did in fact respond to certain reply submissions in its March 21, 2012 response to the Investigating Officer's Report (the IOR). The Guild claims it was reasonable and fair for the Board to draw adverse inferences regarding the submissions that MBS did not challenge or comment upon.

[16] The Board is not a court of law. Section 15 of the *Code* gives the Board the authority to make regulations respecting its proceedings. Moreover, section 46 of the *Regulations* gives the Board the power to vary any rule of procedure under the *Regulations*. Since section 16.1 of the *Code* permits the Board to decide a matter without holding an oral hearing, parties are expected to put their full submissions in writing before the Board. As such, a party who believes that its full case is not before the Board must, at a minimum, request that the Board vary its procedure to allow for further submissions to be made in the interest of natural justice.

[17] In the present case, MBS is essentially submitting that the Board's February 22, 2012 letter and *Regulations* denied it an opportunity to provide rebuttal evidence. Respectfully, this reconsideration panel is not in agreement with this submission.

[18] During the processing of the original application, the Board respected the *audi alteram partem* principle of natural justice and gave the parties the opportunity to know the case they must meet and to respond to it. The parties were reminded to ensure that their full case was before the Board as it may decide the matter based on the written documentation, during the process including for example, in the Board's February 22, 2012 letter and the IOR.

[19] The Board has previously considered the *audi alteram partem* principle in *Lacelle*, 2002 CIRB 166, and adopted the words of L'Heureux-Dubé J. in *Telecommunications Workers Union* v. *Canada (Radio-television and Telecommunications Commission)*, [1995] 2 S.C.R. 781:

> [29] The *audi alteram partem* rule, which is a component of the principles of natural justice and of procedural fairness, requires that a person who is a party to proceedings before a tribunal be informed of the proceedings and provided with an opportunity to be heard by the tribunal.

[20] Additionally, the Board stated in *Kies*, 2008 CIRB 413 that:

> [24] Natural justice is a fluid concept that differs depending on the tribunal in question. For instance, section 16.1 of the *Code* does not require the Board to hold an oral hearing in every case. When the Board chooses not to hold an oral hearing, the right to be heard (*audi alteram partem*) is met through a thorough consideration of the parties' written submissions, responses and replies.

[21] MBS had challenged the inclusion of the MMNN position in the bargaining unit and understood the case it had to meet with regard to the exclusion of the MMNN position from the bargaining unit. If MBS had evidence that supported the exclusion of the position, the onus rested on it to present that evidence to the Board. The fact that in its reply, the Guild countered some of the evidence provided by MBS regarding the exclusion of the MMNN position does not change this.

[22] The Board's February 22, 2012 letter specifically advised the parties to provide the Board with full submissions:

> Please note that, in any event, the Board is entitled under section 16.1 of the *Code* to decide any matter before it without holding an oral hearing. In that case, the Board would determine the application on the basis of the written submissions of the parties and the letter of understanding (or report) of the Investigating Officer. It is therefore in the parties' best interests to file complete and accurate submissions in support of their respective positions and to cooperate fully in the investigation by the Board's officer.

[23] The fact that the Schedule to this letter set out dates for when the parties could expect to provide their submissions did not preclude a party from requesting an opportunity to make additional submissions if it felt that its position was not completely and accurately before the Board.

[24] Additionally, the IOR advised the parties that the file material was being forwarded to the Board for its determination and, that they provide written notice to the Board if they believed that their position was not accurately reflected in the report. MBS did provide a response to the IOR, in which it challenged some of the Guild's reply submissions. However, MBS did not provide, nor request an opportunity to provide, a response to the Guild's submissions regarding the MMNN's non-managerial role in certain termination, discipline and hiring decisions. Rather, MBS submits in the present application that it understood that new evidence and rebuttals were not to be introduced in response to the IOR; but that if it had known that such were permitted, it would have submitted a much more comprehensive rebuttal brief. With respect, the panel is unable to accept this.

[25] The Board has previously stated in *TELUS Corporation*, 2000 CIRB 94 that:

> [12] ... An allegation of denial of natural justice on the ground of failure to provide an opportunity to respond will be defeated if no evidence is presented advancing new material facts that were likely to affect the decision made by the tribunal. (See *Kallio* v. *Canadian Airlines International Ltd.* (1996), 96 CLLC 230-033.)

[26] MBS seems to imply that had it been afforded the opportunity (which, it must be noted, it did not seek) to provide submissions to rebut the evidence regarding the MMNN's lack of managerial authority in the Guild's reply, the Board would have been decided differently. However, MBS has not provided the Board with any further evidence or indicated what further evidence it would present in this application regarding the managerial responsibilities of the MMNN position.

[27] The Board notes a decision of the Nova Scotia Court of Appeal, *Bowater Mersey Paper Co.* v. *C.E.P., Local 141*, 2010 NSCA 19, which dealt with a similar situation regarding the *audi alteram partem* principle, wherein Fichaud J.A. stated:

> [55] Bowater had the full opportunity to object and obtain a ruling from the arbitrator on the propriety of the Union's rebuttal submission. Then the arbitrator could have disallowed the Union's submission or, more likely, received it accompanied by Bowater's surrebuttal. Bowater had the full opportunity, with or without an objection to request a surrebuttal. … Bowater chose to neither object nor request surrebuttal. This was not a denial of Bowater's "full opportunity". This was Bowater's own choice not to exercise its full opportunity.

[28] The Board agrees with the Nova Scotia Court of Appeal's expression that the full opportunity to make submissions does not relieve a party from asserting its right to do so. Given that *MBS 2767*

was determined by way of written submissions, the onus rested fully on MBS to request an opportunity to provide a rebuttal to the evidence submitted by the Guild in its reply, if it believed such was necessary in order to be fully heard. MBS had ample opportunity to do so but chose not to. This is not a failing of natural justice.

[29] Additionally, MBS alleges that the reply is the "last word" and that there is no further opportunity for the submission of new evidence or rebuttal. It cites from the paper, *Canada Industrial Relations Board Regulations, 2001: An Overview*, which is found on CIRB's website. MBS also alleges that it was misled by instructions from a CIRB employee, but does not provide particulars to substantiate its allegations in this regard. Any general guidance provided by a CIRB employee or on its website is not binding on the Board and does not circumscribe its power to determine its own procedures.

[30] The present panel is not persuaded that MBS was denied an opportunity to provide a rebuttal to the Guild's reply submissions. Notably, in its March 21, 2012 letter, MBS did challenge certain of the Guild's reply submissions and it was therefore reasonable for the Board to conclude that it did not take issue with those aspects of the reply that it did not challenge. Similarly, MBS failed to request an opportunity to provide additional submissions if it felt this was necessary in order to provide a complete rebuttal. As such, the panel was entitled to rely on the evidence before it, as it did, to make a reasoned decision. The present panel sees no breach of the principles of natural justice in the Board's decision or in the process leading to its decision.

iii. Did the Board err in the exercise of discretion whether to grant an oral hearing?

[31] MBS further alleges that the Board erred in exercising its discretion not to hold an oral hearing in *MBS 2767*. While MBS acknowledges that the Board retains the discretion to determine whether an oral hearing is needed, it submits that in its March 5, 2012 response, it reserved the right to make further submissions as to any unit of employees the Board might consider to be appropriate for collective bargaining. It argues that the Board breached the principles of natural justice by not affording it an opportunity to challenge the Guild's reply submissions. It also argues that the Board was effectively stating that MBS should have challenged the Guild's reply submissions by way of

cross-examination which could only have occurred at an oral hearing. It argues that by not holding an oral hearing to allow MBS to cross-examine the Guild's reply evidence regarding the MMNN position, the Board made an error in procedural fairness and breached the principles of natural justice. MBS submits that, had it been afforded a mechanism to refute this evidence, it would have done so. The Guild submits that MBS had availed itself of the opportunity to respond to the Guild's March 15, 2012 submissions, and therefore, there was no breach of the principles of natural justice when the Board did not grant an oral hearing.

[32] The Board rarely holds an oral hearing in a certification application. However, pursuant to section 10(*g*) of the *Regulations*, a party must make a request for an oral hearing and provide reasons why an oral hearing would be necessary. The Board reminded the parties of this requirement in its February 22, 2012 letter. It is noteworthy that, in its submissions in the original certification file, MBS did not request an oral hearing, nor provide any reasons as to why an oral hearing would be necessary.

[33] It is well established that section 16.1 gives the Board the discretionary power to decide any matter without holding an oral hearing. Given the implications of section 16.1, the Board's general practice is to advise parties that it is in their "... **best interests to file complete and accurate submissions in support of their respective positions** and to cooperate fully in the investigation by the Board's officer" (emphasis added). The Board provided this advice to these parties in its February 22, 2012 letter.

[34] The current panel is not persuaded that the Board, in *MBS 2767*, expected MBS to have cross-examined the Guild's reply evidence at an oral hearing. As stated above, in this panel's view, MBS had the opportunity to either fully respond to the Guild's reply submissions in its March 21, 2012 letter or to request an opportunity to file a rebuttal to the Guild's reply submissions (or March 22, 2012 letters, as discussed below), if it felt the same was necessary to put its full case before the Board. MBS did not do either. Further, an attempt to reserve the right to file additional submissions may simply result in the Board deciding the matter based on the submission on file (see *Canadian National Railway Company*, 2009 CIRB 446).

[35] This panel finds that, in MBS 2767, since the original application was for certification, the Board followed its policy and did not hold an oral hearing, particularly when the parties did not request an oral hearing. As such, MBS has failed to establish that the Board breached a principle of natural justice by rendering a decision in the matter without holding an oral hearing.

iv. Did the Board err in considering documentation and submissions outside stated time limitations?

[36] MBS further submits that the Board erred in considering documentation and submissions filed outside the time line set out in the Schedule to the Board's February 22, 2012 letter. MBS alleges that the time line for submitting responses to the IOR was March 21, 2012 and that the Board's policy is not to grant extensions of the time lines, except in exceptional circumstances. MBS submits that no extension was requested, nor granted, for the Guild's two March 22, 2012 submissions.

[37] The Guild submits that the Board did not err in considering the Guild's March 22, 2012 letters outside the Schedule's stated time limitations. It argues that MBS had the opportunity to respond to its March 22, 2012 letters but did not respond nor object to them. The Guild submits it did not act improperly in filing these promptly after MBS filed its March 21, 2012 letter and that MBS could similarly have filed further submissions in reply or responded by objecting to these, but chose not to do so. The Guild submits the appropriate time for MBS to have challenged its March 22, 2012 letters was when these were filed and that, since MBS did not challenge or object to their filing, the Board was entitled to consider and rely on them.

[38] As indicated, the Board has the discretionary power to relieve against strict compliance with procedural rules under section 46 of the *Regulations* in order to ensure the proper administration of the *Code*. In the Board's view, the appropriate time for MBS to have objected to the Guild's March 22, 2012 letters was at the time these were filed. MBS could have, for example: advised the Board at that time that it objected to the filing of the letters; requested an opportunity to file a response to the letters; requested an oral hearing; and/or, provided material facts in response in order

to ensure that its full case was before the Board. MBS chose, however, to take no action. The reconsideration panel is, therefore, not prepared to accept MBS's objection to the Guild's March 22, 2012 letters well after the fact and in the context of this reconsideration application.

[39] The reconsideration panel is not persuaded that the Board erred in accepting the Guild's March 22, 2012 letters.

IV–Conclusion

[40] For all of the above reasons, the applicant has failed to establish any grounds for the Board to reconsider *MBS 2767*. The Board finds no reviewable error in *MBS 2767*, which would lead it to alter this decision.

[41] Accordingly, this application for reconsideration is dismissed.

[42] This is a unanimous decision of the Board.

Louise Fecteau
Vice-Chairperson

Judith MacPherson, Q.C
Vice-Chairperson

William G. McMurray
Vice-Chairperson